

EXHIBIT 8

COURT OF APPEALS FOR THE SECOND CIRCUIT

MIRKIN V. XOOM ENERGY, LLC

CASE NO. 18-3138

ORAL ARGUMENT RECORDING

ON

NOVEMBER 6, 2019

SPEAKERS :

JUDGE NEWMAN

JUDGE PARKER

JUDGE POOLER

BURKETT MCINTURFF, ESQUIRE, COUNSEL FOR THE PLAINTIFF

DAVID KOTT, ESQUIRE, COUNSEL FOR THE DEFENDANT

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<p>1 R E C O R D I N G</p> <p>2 JUDGE: The next matter on our calendar is</p> <p>3 Susanna Mirkin and others versus XOOM Energy, LLC.</p> <p>4 Water. Just a little. Thank You. I'm so thirsty</p> <p>5 today. Thank you. Thanks. Good morning. I said</p> <p>6 good morning, counsel.</p> <p>7 MR. MCINTURFF: Good morning, Your Honor.</p> <p>8 Burkett McInturff, on behalf of Susanna and Boris</p> <p>9 Mirkin and the proposed class. May it please the</p> <p>10 Court, this is a simple breach of contract case. The</p> <p>11 defendant's contract requires that their energy rates</p> <p>12 be based on the defendant's supply costs.</p> <p>13 JUDGE: That's not their only basis, but it</p> <p>14 is the basis to start the calculation. Is that your</p> <p>15 argument?</p> <p>16 MR. MCINTURFF: No, Your Honor. That is the</p> <p>17 only basis. The contract says it's based --</p> <p>18 JUDGE: Don't they have other things that</p> <p>19 they say will enter into the cost of the energy?</p> <p>20 MR. MCINTURFF: No, Your Honor. The contract</p> <p>21 says the -- and I'm pointing to page 12 in our opening</p> <p>22 brief -- the customer's monthly variable rate is based</p> <p>23 on XOOM's actual and estimated supply costs, which may</p> <p>24 include, but not be limited to prior period</p> <p>25 adjustments, inventory, and balancing costs. So it's</p> <p style="text-align: right;">Page 2</p>	<p>1 MR. MCINTURFF: No, Your Honor. Our argument</p> <p>2 -- tied to but not identical. They must reflect their</p> <p>3 costs. These companies are very lean businesses.</p> <p>4 They're essentially brokers and traders. They have</p> <p>5 very low overhead. They buy on the wholesale market</p> <p>6 and they resale to consumers. So the wholesale --</p> <p>7 JUDGE: The thing is that the ultimate price</p> <p>8 to the consumer has to have some relationship to their</p> <p>9 supply costs.</p> <p>10 MR. MCINTURFF: Correct. And instead not</p> <p>11 evidence, essentially, price gouging, margins that are</p> <p>12 well in excess of the underlying costs.</p> <p>13 JUDGE: May I ask, isn't this case decided by</p> <p>14 Direct Energy?</p> <p>15 MR. MCINTURFF: The -- this --</p> <p>16 JUDGE: (Crosstalk).</p> <p>17 MR. MCINTURFF: -- as Your Honor dissented,</p> <p>18 this case is the opposite of Direct Energy. And</p> <p>19 Direct Energy, the contract said that the defendant's</p> <p>20 prices were to be based on business and market</p> <p>21 conditions. The Court said, "Well, that's -- there's</p> <p>22 significant leeway in here." The plaintiffs in that</p> <p>23 case were trying to tie the company's rates to its</p> <p>24 supply costs. That was their main argument.</p> <p>25 This is the opposite. The company has bound</p> <p style="text-align: right;">Page 4</p>
<p>1 confined to the defendant's supply costs. That's --</p> <p>2 JUDGE: Whatever balancing costs are, that</p> <p>3 doesn't seem like it's a scientific term.</p> <p>4 MR. MCINTURFF: Balancing costs are actually</p> <p>5 included in the wholesale cost of energy when you</p> <p>6 purchase energy.</p> <p>7 JUDGE: What is a balancing cost?</p> <p>8 MR. MCINTURFF: A balancing cost is one of</p> <p>9 many subcategories of costs that are incorporated in</p> <p>10 the wholesale rate. So the rate that is published in</p> <p>11 -- that an energy company such as XOOM pays to</p> <p>12 purchase energy is composed of dozens of components.</p> <p>13 Though most of those components are regulated costs</p> <p>14 and regulated components and a balancing cost is one</p> <p>15 of those components.</p> <p>16 JUDGE: Their profit, which they're allowed</p> <p>17 to achieve, aren't they allowed a margin over and</p> <p>18 above these costs?</p> <p>19 MR. MCINTURFF: Again, Your Honor, we're not</p> <p>20 taking the position that they're not allowed a margin.</p> <p>21 We're taking the position that their rates have to be</p> <p>22 tied to their supply costs, which is what their</p> <p>23 contract --</p> <p>24 JUDGE: Tied to, but not identical. Isn't</p> <p>25 that what your argument is?</p> <p style="text-align: right;">Page 3</p>	<p>1 its costs, it's -- has bound its rates to its supply</p> <p>2 costs. So we don't have the same problem that the</p> <p>3 plaintiffs had in Direct Energy, where the Court was</p> <p>4 able to say, "Well, there's these myriad of factors.</p> <p>5 There's many things that can go into how the defendant</p> <p>6 sets rate."</p> <p>7 And in Direct Energy, the practices that were</p> <p>8 challenged there are indicative of the practices of</p> <p>9 this industry as a whole. And as pointed out by the</p> <p>10 Public Service Commission staff recently, this is a</p> <p>11 billion-dollar fraud that's being perpetrated on New</p> <p>12 York consumers. Consumers can't compare their prices.</p> <p>13 They can't tell that they're getting overcharged.</p> <p>14 And the energy companies like defendants</p> <p>15 here, they know it and they're charging much higher</p> <p>16 rates than what they're paying for energy and</p> <p>17 consumers are stuck.</p> <p>18 JUDGE: The idea of allowing this kind of</p> <p>19 industry was a consumer protection idea, so that there</p> <p>20 would be negotiation, so that there would be</p> <p>21 competition for the rate payer. So how did it go so</p> <p>22 wrong?</p> <p>23 MR. MCINTURFF: Well, as the PSC staff has</p> <p>24 found that the industry has taken proactive steps to</p> <p>25 obscure their pricing. It's not like when you drive</p> <p style="text-align: right;">Page 5</p>

<p>1 around and you purchase gas, you can look and see what 2 -- how much the gas is charging. This is something 3 that is billed to you constantly as you use your 4 energy. It comes a month later and it's very 5 difficult to compare prices, which is why companies 6 like XOOM make representations that their prices are 7 going to be tied to their costs. They can get market 8 share that way.</p> <p>9 JUDGE: We haven't had discovery yet. So you 10 don't know exactly the relationship between their 11 costs and the prices they charge.</p> <p>12 MR. MCINTURFF: That is true. But we have a 13 very good idea because XOOM purchases on the wholesale 14 market. This is simply a wholesaler. They buy on the 15 wholesale market and they --</p> <p>16 JUDGE: Do you know the price they pay?</p> <p>17 MR. MCINTURFF: We basically know the price. 18 We don't know the exact price. We don't know all of 19 their supply costs. But again, they don't -- they're 20 very lean operations. They don't have a lot of staff. 21 They certainly don't deliver or bill or do or generate 22 --</p> <p>23 JUDGE: What do they do, actually?</p> <p>24 MR. MCINTURFF: They're brokers. They're 25 brokers and companies like XOOM, they even outsource</p> <p style="text-align: right;">Page 6</p>	<p>1 margins compared to what they're paying on wholesale. 2 That's not what you would pay with ConEd or 3 any other utility. And here the contract requires 4 that costs be -- that the defendant's rates be based 5 on their supply costs.</p> <p>6 JUDGE: Well, let me ask you this, Your 7 Honor. Time is running out. But why do you believe 8 your implied covenant claim is viable?</p> <p>9 MR. MCINTURFF: Well, Your Honor, the 10 District Court dismissed the implied covenant claim as 11 duplicative of the contract claim. We decided not to 12 challenge the implied covenant claim. So at this 13 point, it's just breach of contract.</p> <p>14 JUDGE: Are you --</p> <p>15 JUDGE: So it's not unjust enrichment, and 16 it's not implied.</p> <p>17 MR. MCINTURFF: Those two claims were removed 18 from the proposed amended complaint because they were 19 dismissed. Those -- the judge's ruling that those 20 claims were duplicative of the contract claim are not 21 the subject of our appeal.</p> <p>22 JUDGE: What is it that you propose to 23 include in your amended complaint that the Court below 24 rejected?</p> <p>25 MR. MCINTURFF: Well, the Court below faulted</p> <p style="text-align: right;">Page 8</p>
<p>1 their marketing. They're --</p> <p>2 JUDGE: Call me all the time, these people. 3 They want me to change my supplier. That -- they do 4 that. So they have a marketing.</p> <p>5 MR. MCINTURFF: Well, not necessarily, Your 6 Honor. The -- many of the marketing components are 7 outsourced. But again, this is a product you sign up 8 once. As Your Honor pointed out in Your Honor's 9 dissent in the Richards case, maybe you do some 10 diligence the first month. You sign up the first 11 month. But they trick you there. They give you a 12 teaser rate.</p> <p>13 So the month that you sign up, where you're 14 doing diligence, you're on a teaser rate, and then the 15 next months come and they raise your rate and raise 16 your rate and raise your rate, and all of a sudden 17 you're paying sometimes 30, 40, 50 percent more than 18 you would have paid your utility for the same energy. 19 It's the same stuff. There's no difference.</p> <p>20 And here the defendants have tied their 21 contract, their prices, to their underlying supply 22 costs. We allege in the complaint, which must be 23 taken as true, and we show based on wholesale prices, 24 that the defendant's costs don't resemble their supply 25 costs. In fact, they're taking 40, 50, 60 percent</p> <p style="text-align: right;">Page 7</p>	<p>1 us for -- the perceived faults that the Court found 2 was, is that we didn't disclose our calculations 3 because it's a complaint, but we disclosed our 4 calculations so that the Court could see how the 5 various components added up and didn't equal anywhere 6 near what the prices XOOM's -- XOOM was charging.</p> <p>7 The Court also found that we didn't specify 8 as clearly as the Court would have liked. That XOOM 9 purchases on the wholesale market, which is key 10 because if XOOM says our rates are going to be based 11 on our costs, it's a fair point to say, well, what are 12 your costs?</p> <p>13 Well, we found proof that XOOM is a 14 participant in New York's regulated wholesale energy 15 market, and so we're able to determine their costs. 16 And when you line up their costs for energy alongside 17 the rates they charge, it doesn't add up. And it's 18 consistent with a pattern of behavior that has harmed 19 New York consumers to the tune of billions of dollars.</p> <p>20 In this case it's just one of the many 21 consumer protection actions that are trying to bring 22 some oversight to this industry and protect New York 23 consumers, and we should have been allowed and should 24 be allowed to proceed to discovery. Thank you.</p> <p>25 JUDGE: Are you here arguing the sufficiency</p> <p style="text-align: right;">Page 9</p>


<p>1 of your first complaint or your amended complaint?</p> <p>2 MR. MCINTURFF: Both, Your Honor. The first</p> <p>3 complaint we believe was sufficient. It's a simple</p> <p>4 breach of contract case. The defendant's contract</p> <p>5 says its prices are based on --</p> <p>6 JUDGE: Whether it's simple or not. You --</p> <p>7 I'm a little surprised you're even invoking the first</p> <p>8 complaint. If you've got a second complaint in the</p> <p>9 record and that's the one that is limited to the</p> <p>10 breach of contract and drops the others, I would have</p> <p>11 thought you're here on the second complaint.</p> <p>12 MR. MCINTURFF: We're here on both because</p> <p>13 it's at the -- we're at the pleading stage, Your</p> <p>14 Honor, and we pled what XOOM's --</p> <p>15 JUDGE: Why do you want the first one if --</p> <p>16 which has three causes of action, two of which you</p> <p>17 just told us you dropped. So why should we look at</p> <p>18 something most of which is gone?</p> <p>19 JUDGE: What's in the first that's not in the</p> <p>20 second?</p> <p>21 MR. MCINTURFF: Fair enough. If we have to</p> <p>22 stand on one complaint, we would stand on this.</p> <p>23 JUDGE: It'd be the second one?</p> <p>24 MR. MCINTURFF: The second complaint.</p> <p>25 JUDGE: All right. Now, and the District</p> <p>Page 10</p>	<p>1 JUDGE: So I -- that's why I don't</p> <p>2 understand. In your -- well, your first complaint</p> <p>3 does talk about supply. But if your theory is they</p> <p>4 promise that the price to the consumer would vary</p> <p>5 according to the wholesale price, then why not just</p> <p>6 say that? Why do you then sort of use the more</p> <p>7 general terms supply? Because of -- they could get</p> <p>8 supply theoretically on the retail market. They could</p> <p>9 go to another retailer.</p> <p>10 MR. MCINTURFF: Well, Your Honor, the</p> <p>11 contract bases the prices on the defendant's "supply</p> <p>12 costs." And we know as we allege in the complaint</p> <p>13 that they buy wholesale. So we -- they don't buy from</p> <p>14 another retailer and we allege, and must be taken as</p> <p>15 truth, they buy wholesale. They pay the wholesale</p> <p>16 price. And so, we know based on our experience in the</p> <p>17 industry that that's essentially all they do is they -</p> <p>18 -</p> <p>19 JUDGE: That's what's alleged?</p> <p>20 MR. MCINTURFF: -- buy wholesale. That's</p> <p>21 what we allege, that is 90 percent of their --</p> <p>22 JUDGE: Is it fair to say --</p> <p>23 MR. MCINTURFF: -- of their costs.</p> <p>24 JUDGE: -- the class allegations have nothing</p> <p>25 to do with any issue before us now?</p> <p>Page 12</p>
<p>1 Court referred to the -- an allegation of wholesale</p> <p>2 costs being 90 percent of total costs.</p> <p>3 MR. MCINTURFF: That's correct.</p> <p>4 JUDGE: Is that in the second complaint?</p> <p>5 MR. MCINTURFF: Yes, Your Honor.</p> <p>6 JUDGE: Can you tell me -- do you know</p> <p>7 offhand or can you help me find which paragraph?</p> <p>8 MR. MCINTURFF: Yes, Your Honor. I can.</p> <p>9 JUDGE: I thought it was there. I just don't</p> <p>10 see it as I look. Well, anyway, what -- you're</p> <p>11 satisfied it's in there somewhere?</p> <p>12 MR. MCINTURFF: Yes, Your Honor. If you'd</p> <p>13 like, we can submit a letter --</p> <p>14 JUDGE: No. We're fine. If it's -- if you</p> <p>15 say it's in there, well.</p> <p>16 MR. MCINTURFF: It's definitely in there.</p> <p>17 JUDGE: (Crosstalk).</p> <p>18 MR. MCINTURFF: A term search would --</p> <p>19 JUDGE: All right. Now, you keep talking</p> <p>20 about their supply costs, but in fact, your second</p> <p>21 complaints refers specifically to the fact that they -</p> <p>22 - the supply costs were based on their costs in the</p> <p>23 wholesale market.</p> <p>24 MR. MCINTURFF: That's correct. They buy on</p> <p>25 the wholesale market. So they -- again, they --</p> <p>Page 11</p>	<p>1 MR. MCINTURFF: That's fair to say, Your</p> <p>2 Honor. It was --</p> <p>3 JUDGE: Well, then if we find the second</p> <p>4 complaint is sufficient, it will be up to the district</p> <p>5 judge to decide in the first instance the class issue.</p> <p>6 MR. MCINTURFF: That's correct, Your Honor.</p> <p>7 We were dismissed on the pleadings. We haven't --</p> <p>8 we've had no discovery. We haven't been permitted to</p> <p>9 show that their prerequisites of Rule 23 have been</p> <p>10 met.</p> <p>11 JUDGE: Reserve two minutes for rebuttal.</p> <p>12 MR. MCINTURFF: Thank You, Your Honor.</p> <p>13 JUDGE: We'll hear from XOOM.</p> <p>14 MR. KOTT: May it please the Court. My name</p> <p>15 is David Kott. I am the attorney for the defendant's</p> <p>16 appellees. Here's what the contract says, and it's on</p> <p>17 page A94 of the appendix.</p> <p>18 JUDGE: Ninety-four?</p> <p>19 MR. KOTT: A94 of the appendix. The first</p> <p>20 paragraph of the contract says that the customer's</p> <p>21 variable market rate will be "based upon actual and</p> <p>22 estimated, and estimated supply costs, which may</p> <p>23 include but not limited to, but not limited to, prior</p> <p>24 period adjustments, inventory and balancing costs."</p> <p>25 That's the contract provision we're dealing with on</p> <p>Page 13</p>

<p>1 this appeal.</p> <p>2 And when you look at either the plaintiff's</p> <p>3 initial complaint or the plaintiff's proposed amended</p> <p>4 complaint, it has no allegations about the estimated</p> <p>5 costs of XOOM.</p> <p>6 JUDGE: Well, if you are --</p> <p>7 JUDGE: But the prices you actually charge,</p> <p>8 it seems to me, can't be divined or can't be matched</p> <p>9 up with what you say you're going to do. You say that</p> <p>10 it's based on the actual and estimated cost. Would</p> <p>11 you agree that you're dealing with a commodity and you</p> <p>12 are essentially a commodity broker?</p> <p>13 MR. KOTT: Yeah. I think I would agree with</p> <p>14 that Judge.</p> <p>15 JUDGE: All right. So we start off in the --</p> <p>16 you have this teaser rate. And, you know, the next</p> <p>17 month you're charging 12.50 in the market is 11.89.</p> <p>18 Then two months later you're 50 percent over the</p> <p>19 market rate. The next month you're 45 percent over</p> <p>20 the rate. The -- and by October you're 60 percent</p> <p>21 over the rate.</p> <p>22 I have a tough time understanding how in a</p> <p>23 commodities business where, I mean, you're improving</p> <p>24 on -- electricity is electricity. It's not even like</p> <p>25 you're selling better electricity or anything like</p> <p>Page 14</p>	<p>1 charge estimated costs.</p> <p>2 JUDGE: But if you are any kind of business</p> <p>3 people, the estimated costs should track the real</p> <p>4 costs only be a lagging indicator --</p> <p>5 MR. KOTT: Well --</p> <p>6 JUDGE: -- correct?</p> <p>7 MR. KOTT: Well, it would --</p> <p>8 JUDGE: I mean, that -- isn't that what you</p> <p>9 try to do, estimate accurately?</p> <p>10 MR. KOTT: Of course. But we're in an</p> <p>11 industry where you sometimes can get spikes in prices.</p> <p>12 You can get the polar vortex where the energy soars</p> <p>13 because everybody is very shivering in their home.</p> <p>14 JUDGE: But that's all for trial. Maybe</p> <p>15 you're going to show that in fact your rate did vary</p> <p>16 according to the wholesale rate because it spiked, it</p> <p>17 went down.</p> <p>18 MR. KOTT: Uh-huh.</p> <p>19 JUDGE: You may win. But right now you've</p> <p>20 got a contract that says supply costs and they've</p> <p>21 alleged your rate didn't vary with supply costs. That</p> <p>22 in fact the wholesale rate was 90 percent of your</p> <p>23 supply costs and it didn't vary with that.</p> <p>24 MR. KOTT: Right. And I think we're back,</p> <p>25 Judge Newman, to Iqbal and Twombly. They've alleged</p> <p>Page 16</p>
<p>1 that. It seems to me you're just simply taking a</p> <p>2 wholesale rate and tacking on a tremendous writeup,</p> <p>3 which hard to believe, reflects any additional value</p> <p>4 you add or anything you do.</p> <p>5 MR. KOTT: Couple --</p> <p>6 JUDGE: And so, it seems to me, once I look</p> <p>7 at the chart, that your representations aren't what</p> <p>8 you're really doing. And you may be able to win, but</p> <p>9 this is just at a pleading stage.</p> <p>10 MR. KOTT: Couple responses to that, Judge.</p> <p>11 JUDGE: Please.</p> <p>12 MR. KOTT: First, the market rate the Court</p> <p>13 just referred to is a market rate calculated by the</p> <p>14 plaintiffs unrelated to the costs set forth in the</p> <p>15 contract that I just quoted. It --</p> <p>16 JUDGE: Is that related to the wholesale</p> <p>17 cost?</p> <p>18 MR. KOTT: Not their market rate. They put</p> <p>19 in the market rate. And that's what Judge Parker just</p> <p>20 asked me. They put in the market rate. And when they</p> <p>21 put in the elements of the market rate, which is what</p> <p>22 the Court just asked me, comparing the market rate,</p> <p>23 that's their market rate, that has elements that</p> <p>24 aren't found anywhere in the contract. That's the</p> <p>25 first thing. Second thing, the contracts allows us to</p> <p>Page 15</p>	<p>1 90 percent conclusory terms.</p> <p>2 JUDGE: That's a -- yeah. I understand. I</p> <p>3 was curious about that. The District Court said that.</p> <p>4 They said the nine -- the statement that more than 90</p> <p>5 percent of defendant's supply costs come from its</p> <p>6 purchase of wholesale energy. What's conclusory about</p> <p>7 that?</p> <p>8 MR. KOTT: Because they have no basis that</p> <p>9 our supply costs, meaning XOOM's, are 90 percent.</p> <p>10 JUDGE: Well, that's why they want discovery,</p> <p>11 counsel.</p> <p>12 MR. KOTT: And that's why I -- Judge Pooler,</p> <p>13 that's why I said I think this is an Iqbal and</p> <p>14 Twombly, because in Iqbal and Twombly, the Supreme</p> <p>15 Court was clear, you must set forth a plausible cause</p> <p>16 of action, not based on speculation, based on actual</p> <p>17 facts before you --</p> <p>18 JUDGE: (Crosstalk) conclusion. What is the</p> <p>19 conclusion? What's conclusory rather as distinguished</p> <p>20 from factual when you say more than 90 percent come</p> <p>21 from the purchase of wholesale energy? Which word or</p> <p>22 phrase is a naked conclusion?</p> <p>23 MR. KOTT: The 90 percent because it's not</p> <p>24 tethered --</p> <p>25 JUDGE: That's not specific enough, 90</p> <p>Page 17</p>

<p>1 percent?</p> <p>2 MR. KOTT: It's not tethered to the contract.</p> <p>3 The contract says we can take into account --</p> <p>4 JUDGE: It's tethered to the word supply.</p> <p>5 That's in the contract, supply --</p> <p>6 MR. KOTT: Right.</p> <p>7 JUDGE: -- costs.</p> <p>8 MR. KOTT: Right.</p> <p>9 JUDGE: And that's the very same sentence.</p> <p>10 90 percent of defendant's supply costs come from its</p> <p>11 purchase of wholesale energy.</p> <p>12 MR. KOTT: Right.</p> <p>13 JUDGE: So again, where's the conclusory</p> <p>14 statement?</p> <p>15 MR. KOTT: I would submit that the entire</p> <p>16 sentence that the Court, Judge Newman, you just read</p> <p>17 to me is conclusory. There's nothing tied there to</p> <p>18 the words of the contract, which means estimated</p> <p>19 supply costs and which includes prior period.</p> <p>20 JUDGE: (Crosstalk) it said more than 90</p> <p>21 percent of defendant's actual and estimated supply</p> <p>22 costs, then it wouldn't have been conclusory?</p> <p>23 MR. KOTT: Taking into account other factors</p> <p>24 such as prior period adjustments --</p> <p>25 JUDGE: You don't have to recite the whole</p> <p style="text-align: right;">Page 18</p>	<p>1 JUDGE: That's Iqbal?</p> <p>2 MR. KOTT: Yeah. I do think it's just as --</p> <p>3 I think the lesson of Iqbal and Twombly, and I know</p> <p>4 Your Honors deal with it more than I do, you deal with</p> <p>5 it every day, is you don't get to say -- and the</p> <p>6 plaintiffs have done this. If you look at page A83 of</p> <p>7 the appendix in paragraph 58 of their proposed amended</p> <p>8 complaint, they talk about if we could get additional</p> <p>9 discovery, we could prove.</p> <p>10 If you look at plaintiff's reply brief at</p> <p>11 page 18, plaintiff's opening brief at page 16, it</p> <p>12 talks about -- and I'm going to be very general. It</p> <p>13 talks -- yeah. If we can get some more discovery, we</p> <p>14 can fill in the holes that we have in our complaint.</p> <p>15 JUDGE: No. I -- you know, you keep invoking</p> <p>16 Iqbal and Twombly. What seems to me to be plausibly</p> <p>17 alleged from -- in this complaint is that you use a</p> <p>18 teaser rate. You say it's going to -- that the rates</p> <p>19 going forward are going to be based on supply costs</p> <p>20 and that's qualified with -- you know, may include but</p> <p>21 not limited, prior period adjustments, inventory,</p> <p>22 balancing costs and so forth.</p> <p>23 And what you're doing here is, as soon as the</p> <p>24 teaser rate is expired, you're jacking these rates way</p> <p>25 up, hoping that people who are your customers aren't</p> <p style="text-align: right;">Page 20</p>
<p>1 contract every time they make an allegation.</p> <p>2 MR. KOTT: Well, I don't -- in the District</p> <p>3 Court here, in her first motion to dismiss -- order</p> <p>4 granting the motion to dismiss, was very clear and</p> <p>5 gave a roadmap to the plaintiffs as to what the Court</p> <p>6 thought was insufficiently pled under --</p> <p>7 JUDGE: (Crosstalk).</p> <p>8 MR. KOTT: -- Iqbal and Twombly.</p> <p>9 JUDGE: They didn't even use the word</p> <p>10 wholesale the first time.</p> <p>11 MR. KOTT: Right. Right. And in the --</p> <p>12 JUDGE: They now come back and they say, "All</p> <p>13 right, Judge. You faulted us for not talking about</p> <p>14 wholesale. We'll talk about wholesale. And we won't</p> <p>15 just say it's in there somewhere, we'll say 90 percent</p> <p>16 of it is wholesale."</p> <p>17 MR. KOTT: Right.</p> <p>18 JUDGE: You don't think that's specific?</p> <p>19 MR. KOTT: No. I don't think under Iqbal and</p> <p>20 Twombly because it's not tethered to the words of the</p> <p>21 contract. They don't explain where they get 90</p> <p>22 percent.</p> <p>23 JUDGE: Conclusory is saying the Attorney</p> <p>24 General did something wrong.</p> <p>25 MR. KOTT: Yeah. I --</p> <p style="text-align: right;">Page 19</p>	<p>1 going to be sophisticated enough to decode their</p> <p>2 utility to bill to see this wild variation, upward</p> <p>3 variation, in the price of something that's</p> <p>4 essentially a commodity which you buy as a broker in a</p> <p>5 commodities market.</p> <p>6 Seems misleading to me -- I don't mean</p> <p>7 misleading to me, but it seems to me that is</p> <p>8 essentially what they're alleging. And I see nothing</p> <p>9 implausible about that. They may be wrong, they may</p> <p>10 not be able to prove it, but it certainly seems</p> <p>11 plausible to me.</p> <p>12 MR. KOTT: Judge Parker, I think that</p> <p>13 ignores, right in the first page of the contract,</p> <p>14 right in the middle where the contract states to the</p> <p>15 customer, "We do not guarantee savings." In the first</p> <p>16 page of the contract under the term, the contract --</p> <p>17 the customer can end this contract either in writing</p> <p>18 or by calling a toll-free number. In fact, we know</p> <p>19 this customer --</p> <p>20 JUDGE: (Crosstalk).</p> <p>21 MR. KOTT: -- Mr. Mirkin, he's price</p> <p>22 sensitive. He's paying attention. He's paying</p> <p>23 attention.</p> <p>24 JUDGE: (Crosstalk) --</p> <p>25 MR. KOTT: He will --</p> <p style="text-align: right;">Page 21</p>

<p>1 JUDGE: -- counsel eliminates the possibility 2 that you're -- that you've breached your contract? 3 MR. KOTT: Not at all. I'm simply responding 4 to Judge Parker's question that the consumer doesn't 5 know, and essentially, we take advantage of the 6 consumer by the teaser rate. Here we have a price 7 sensitive customer. We know that because of his other 8 class action brought by the same attorneys when he 9 bought energy like we did for Viridian. 10 JUDGE: You think you have a price sensitive 11 class? 12 MR. KOTT: I don't -- I hadn't anticipated 13 that question because class issues aren't here, Your 14 Honor. I will confess I had not thought about that. 15 JUDGE: I'll withdraw it. 16 MR. KOTT: But on this record, for who's in 17 the class, the people on the -- in the class, would be 18 people who would have received this contract, which 19 says, number one, we don't guarantee any savings. And 20 number two, you can leave whenever you want. Just 21 pick up the phone and dial an 800 number. 22 JUDGE: Well, I appreciate you don't 23 guarantee a saving because the wholesale price may go 24 way up, in which case the consumer price is going to 25 go way up. I get that. But isn't the customer</p> <p>Page 22</p>	<p>1 consumer can have that expectation. I do not think 2 the consumer can have the -- 3 JUDGE: Supposing, in fact, it was 98 4 percent, would the consumer then be entitled to think, 5 "Well, if wholesale costs vary, my costs are going to 6 vary"? 7 MR. KOTT: And we may be talking about a 8 different contract. A lot of the cases -- 9 JUDGE: I'm just wondering if your problem is 10 with that 90 is too low a number, or you don't like 11 the whole concept of putting a percentage on it? 12 MR. KOTT: I don't like the concept -- 13 JUDGE: That's what I thought. 14 MR. KOTT: Let me back up. I don't -- 15 JUDGE: You're not really quarrelling with 16 90. 17 MR. KOTT: Well, there's nothing in this 18 record that supports 90 percent. Other than a -- 19 JUDGE: Of course, there's not. Because they 20 haven't had a trial. 21 MR. KOTT: And -- 22 JUDGE: They've pled 90 percent. 23 MR. KOTT: Right. 24 JUDGE: So to tell me there's nothing in the 25 record on a motion to dismiss is, if you'll forgive</p> <p>Page 24</p>
<p>1 entitled to think as the wholesale price varies since 2 it's 90 percent of your price, then my cost is going 3 to vary? 4 MR. KOTT: No -- 5 JUDGE: That's not a fair inference? 6 MR. KOTT: No. Because we have prior period 7 adjustments. There might be adjustments that come in 8 that affect that. This customer was only with us for 9 about five months. We have balancing costs and we may 10 have other costs -- 11 JUDGE: Even though this is 90 percent of the 12 price? 13 MR. KOTT: Well, again, I had the colloquy 14 earlier with the Court on my view on whether 90 15 percent is a conclusory allegation or not. 16 JUDGE: I understand you called it 17 conclusory. 18 MR. KOTT: Yeah. 19 JUDGE: Whether it's conclusory or not, it's 20 still 90 percent, which is a lot. 21 MR. KOTT: Right. But it doesn't -- 22 JUDGE: Does a consumer then think that, "My 23 price is going to vary substantially with wholesale 24 costs"? 25 MR. KOTT: On this contract I don't think the</p> <p>Page 23</p>	<p>1 me, a bit disingenuous that there's nothing in the 2 record. 3 MR. KOTT: And I might have been overbroad. 4 There's nothing that supports the allegation of 90 5 percent in the record. 6 JUDGE: How would there be? 7 MR. KOTT: You could do it from other energy 8 companies. You could get the information from any -- 9 this -- 10 JUDGE: Why should you do that at the 11 pleading stage if you've said 90 percent? 12 MR. KOTT: Because I think under my reading 13 of the case law, that's what's required. 14 JUDGE: I see. Okay. 15 JUDGE: Thank you. 16 MR. KOTT: Thank you. We thank the Court. 17 JUDGE: Counsel, you've reserved two minutes 18 for rebuttal. 19 MR. MCINTURFF: Yes, Your Honor. Just 20 briefly. To Your Honor's prior question about the 90 21 percent allegation, that's on -- it's on page A64 of 22 the Appendix. 23 JUDGE: Sixty-four? 24 MR. MCINTURFF: Yes, Your Honor. It's 25 paragraph four in the proposed amended complaint.</p> <p>Page 25</p>

<p>1 JUDGE: Yeah. Got it.</p> <p>2 MR. MCINTURFF: And just briefly to address</p> <p>3 the defendant's point about prior period adjustments.</p> <p>4 The charts that we put in the complaint show that the</p> <p>5 wholesale costs during the relevant period are quite</p> <p>6 stable. And essentially what the defendants are</p> <p>7 asking that the Court do at the pleading stage is</p> <p>8 assume that there was some prior period where</p> <p>9 wholesale prices were very, very high and that they</p> <p>10 were very positive. They were -- the spikes were both</p> <p>11 high and positive and they were prolonged.</p> <p>12 And that's simply a question of fact that at</p> <p>13 this stage of the litigation that can't be answered.</p> <p>14 And we believe that we've met Twombly and Iqbal, we've</p> <p>15 plausibly alleged that they're a wholesale market</p> <p>16 participant. They -- there's publicly available data</p> <p>17 about their participation in the wholesale markets.</p> <p>18 We're able to calculate the wholesale price for this</p> <p>19 plaintiff during their exact billing cycles.</p> <p>20 And when you compare the two -- the prices</p> <p>21 that they paid for wholesale and that -- the</p> <p>22 defendants paid for wholesale energy compared to what</p> <p>23 the consumer paid, it simply doesn't add up. It's the</p> <p>24 prices that the defendants are charging are not</p> <p>25 connected to their wholesale costs. And we have</p> <p>Page 26</p>	<p>1 MR. MCINTURFF: To beat the utility. So</p> <p>2 basically, you had to guarantee savings.</p> <p>3 JUDGE: You'd have to make money under that.</p> <p>4 I mean, the consumer would have to save money.</p> <p>5 MR. MCINTURFF: Correct. That was the only</p> <p>6 way they would permit an ESCO like the defendants to</p> <p>7 charge a variable energy rate.</p> <p>8 JUDGE: What happened with that?</p> <p>9 MR. MCINTURFF: So the hearing has occurred,</p> <p>10 but the industry challenged the PSC's authority --</p> <p>11 JUDGE: I'm not surprised.</p> <p>12 MR. MCINTURFF: -- to issue the regulation.</p> <p>13 And in May of this year, the New York Court of Appeals</p> <p>14 upheld the PSC's authority to hold the hearing, but</p> <p>15 the results of the hearing have not occurred.</p> <p>16 JUDGE: Oh, that's pending.</p> <p>17 MR. MCINTURFF: That is pending, Your Honor.</p> <p>18 JUDGE: They may change this whole industry.</p> <p>19 MR. MCINTURFF: Hopefully, Your Honor.</p> <p>20 JUDGE: Thank you.</p> <p>21 JUDGE: Are you familiar with the Erickson</p> <p>22 case Supreme Court decided after Iqbal?</p> <p>23 MR. MCINTURFF: No, Your Honor.</p> <p>24 JUDGE: You might want to look. It always</p> <p>25 interests me that plaintiffs -- I understand the</p> <p>Page 28</p>
<p>1 therefore alleged a breach of contract.</p> <p>2 JUDGE: Also --</p> <p>3 JUDGE: Are you familiar --</p> <p>4 JUDGE: -- you were the attorney for the</p> <p>5 Mirkins in their previous case against Viridian?</p> <p>6 MR. MCINTURFF: I was one of the attorneys,</p> <p>7 Your Honor.</p> <p>8 JUDGE: You mentioned that the staff of the</p> <p>9 Public Service Commission has now said this is a</p> <p>10 billion-dollar scam. What do you propose as a</p> <p>11 solution? Reregulation or what?</p> <p>12 MR. MCINTURFF: Well, Your Honor, if it was</p> <p>13 up to me. But --</p> <p>14 JUDGE: Well, I mean --</p> <p>15 MR. MCINTURFF: -- what the -- what is</p> <p>16 currently proceeding in the Public Service Commission</p> <p>17 is -- the Mirkins filed their first case against</p> <p>18 Viridian Energy in 2014. Late at the end of 2014, the</p> <p>19 Public Service Commission announced a reset of the</p> <p>20 market where they were deciding to hold a hearing</p> <p>21 whether to evaluate whether all ESCOs could be</p> <p>22 prohibited from providing variable rate products</p> <p>23 unless they guaranteed to beat the utility. And that</p> <p>24 proceeding last summer proceeded to --</p> <p>25 JUDGE: Unless they guaranteed what?</p> <p>Page 27</p>	<p>1 problem you're confronted with Iqbal and Twombly, and</p> <p>2 so everybody says whether or not it meets Iqbal and</p> <p>3 Twombly. But within two weeks of those cases, they</p> <p>4 reversed the District Court for throwing out a</p> <p>5 complaint, a very short complaint. Short, concise,</p> <p>6 according to the rule, and they reinstated it.</p> <p>7 So I don't understand why plaintiffs don't</p> <p>8 say we are sufficient under the Twombly, Iqbal,</p> <p>9 Erickson rule, which gets the full sequence.</p> <p>10 MR. MCINTURFF: I'll read it on the train,</p> <p>11 Your Honor.</p> <p>12 JUDGE: Thank you.</p> <p>13 JUDGE: Thank you, counsel.</p> <p>14 MR. MCINTURFF: Thank you.</p> <p>15 JUDGE: Thank you both. Lively discussion.</p> <p>16 JUDGE: Thank you all.</p> <p>17 JUDGE: Will reserve decision.</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>Page 29</p>

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